STATE OF CALIFORNIA – HEALTH AND HUMAN SERVICES AGENCY ARNOLD SCHWARZENEGGER, *Governor*

EMERGENCY MEDICAL SERVICES AUTHORITY
1930 9th STREET
SACRAMENTO, CA 95811-7043
(916) 322-4336 FAX (916) 324-2875

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Jim Hone, President
Los Angeles Area Fire Chief's Association
333 Olympic Drive
Santa Monica, CA 90401

Cathy Chidester BSN, MSN, Director
Los Angeles County Emergency Medical Services Agency
10100 Pioneer Blvd., Suite 200
Santa Fe Springs, CA 90670

Dear Mr. Hone and Ms. Chidester:

This letter is a follow-up to the initial comments provided by EMSA to the Commission on EMS on June 25, 2008 (copy enclosed), which was a response to each of your letters requesting an opinion from the Emergency Medical Services Authority (EMSA) regarding: potential regulatory and statutory conflicts in existing laws and regulations, whether cities that meet the requirements of Health and Safety Code (H&S) Section 1797.201 (.201) are required to enter into certain types of agreements related to patient care, protocols, etc., and if signing those agreements extinguish the rights of such cities.

As indicated at that EMS Commission meeting, EMSA has further reviewed the California Health and Safety Code, the California Code of Regulations and various court cases. This has given us the opportunity to carefully respond to the important questions raised.

The questions posed in the letters appear to have been already substantially answered by the California Supreme Court in its opinions contained in the cases of *County of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909 (1997) (the "San Bernardino decision"), and *Valley Medical Transport v. Apple Valley Fire Protection District*, 17 Cal.4th 747 (1998) (the "Apple Valley decision"). Additionally, the Appellate Court decision in *City of Petaluma v. County of Sonoma*, 12 Cal. App.4th 1239 (1993) (the "Petaluma decision") is illustrative. In our present response, EMSA relies extensively upon the clarification given in these decisions.

OVERVIEW OF THE QUESTIONS:

Specifically, the Los Angeles Area Fire Chiefs Association (LAAFCA) submitted two letters to EMSA presenting their legal rationale and asked five fundamental questions:

In the first letter, LAAFCA asks EMSA to issue a written opinion clarifying the rights of .201 agencies as those rights pertain to the "written agreement" requirements contained in various state regulations and state minimum standards. The two questions posed were:

1. *Are "written agreements" to effectuate "Standard Field Treatment Protocols (SFTP) required by statute for eligible ".201" agencies?*

2. *Is the implementation of SFTPs an increase in the "Level" of prehospital EMS or an expansion into a new "Type" of prehospital EMS, as those terms have been interpreted by the San Bernardino and Apple Valley Cases?*

The second letter asks for a determination of whether or not state regulations, minimum standards, and recommended guidelines are irreconcilably in conflict with H&S Section 1797.201. The three questions posed were:

1. *Are written agreements required with eligible ".201" agencies for the purposes of establishing a local EMS agency's compliance with various state regulations found in "Chapter 4, 100167(b)(4)," "Chapter 3, 100105", "Chapter 3, 100107,", "Chapter 8, 100300(b)(4)," "Chapter 8. 100300(c)(1)?"*

2. *Are written agreements required with eligible ".201" agencies for the purposes of establishing a local EMS agency's compliance State "Minimum Standard 1.24?"*

3. *Would EMSA make a determination that local EMS agencies who have eligible ".201" providers receive a "Meets minimum standard" assessment, where the "written agreement" evaluation criteria is applied to eligible ".201" agencies?*

EMSA additionally received a letter from the Los Angeles County (LAC) EMS Agency requesting clarification about whether agreements required by EMSA to meet regulatory standards extinguish the rights of cities pursuant to *H&S 1797.201.*

1. *Does signing <u>any</u> agreement with the EMS Agency extinguish the "grandfathering" rights of cities pursuant to?*

2. *Can the local EMS agency design its system to include contracts with eligible ".201" agencies to implement new programs and services?*

<u>BACKGROUND</u>:

The LAC EMS Agency established a Standing Field Treatment Protocol (SFTP) Program in 1996 which provides standing orders for approved paramedic providers to

initiate treatment without establishing voice contact to a base hospital. According to the LAC EMS Agency, the program was designed in collaboration with all paramedic provider agencies. All participating cities, including some ".201" cities, had previously signed an SFTP agreement with the LAC EMS Agency and subsequently signed renewal agreements. However, in June 2007 many cities refused to sign renewal agreements under the program. Representatives of the city fire departments informed the LAC EMS Agency that their legal advisors believed that signing the SFTP agreement, or any agreement with the LAC EMS Agency, would extinguish their ".201 rights."

Health and Safety Code Section 1797.201 reads:

> *Upon request of a city or fire district that contracted for or provided, as of June 1, 1980, prehospital emergency medical services, a county shall enter into a written agreement with the city or fire district regarding the provision of prehospital emergency medical services for that city or fire district. Until such time that an agreement is reached, prehospital emergency medical services shall be continued at not less than the existing level, and the administration of prehospital EMS by cities and fire districts presently providing such services shall be retained by those cities and fire districts, except the level of prehospital EMS may be reduced where the city council, or the governing body of a fire district, pursuant to a public hearing, determines that the reduction is necessary.*
>
> *Notwithstanding any provision of this section the provisions of Chapter 5 (commencing with Section 1798) shall apply.*

DISCUSSION:

EMSA strongly believes there is no conflict between existing statutes and the regulatory requirement for a written agreement due to the nature of 1797.201 and the significance placed on the integration and coordination of EMS found in 1797.204. Although the San Bernardino decision makes clear that cities and fire districts must be integrated by agreement, there is no statutory deadline imposed for requesting or reaching such agreement. The dilemma caused by this forms the basis for our response to the questions posed to EMSA.

<u>The Nature of HS 1797.201</u>

H&S 1797.201 allows existing cities and fire districts that provided care prior to June 1, 1980 to continue services and retain administration of these prehospital services, under very specific parameters until formal integration through an agreement between the city or fire district and local emergency medical services agency (LEMSA) occurs. H&S Code Section 1797.201 sets forth the specific obligation for cities and fire districts that

meet the criteria in this section to continue providing service until such time as they enter into a written agreement with the county.

Importantly, the court in the San Bernardino decision noted that "...section 1797.201 is 'transitional' in the sense that there is a manifest legislative expectation that cities and counties will eventually come to an agreement with regard to the provision of emergency medical services ....." *County of San Bernardino* at 922.

The court here also noted a "pre-agreement period". The pre-agreement period of H&S Section 1797.201 requires that a city or county which is performing prehospital emergency medical services as of June 1, 1980, to continue doing so until such time as an agreement is reached with the county. In the post agreement period of an implementation, the city or county is considered an integrated part of the local EMS system pursuant to the terms of the agreement. The San Bernardino decision states that "Nothing in this reference to section 1797.201 suggests that cities or fire districts are to be allowed to expand their services, or to create their own exclusive operating areas." *County of San Bernardino* at 932.

It is also recognized that until such time as an agreement is reached, the authorization for LALS or ALS as noted in 1797.178 is derived statutorily, provided medical control is maintained. Therefore, a written agreement cannot be compelled for those entities falling under the provision of H&S Section 1797.201 that have yet to enter into an agreement with the county. The legislative intent for H&S Section 1797.201 is clear that the pre agreement phase would be a temporary, transitional period of time. However, 28 years after the implementation of this section there are still a few cities and fire districts that have not entered into a written agreement to integrate into the local EMS system.

In the pre-agreement period, there is no provision that provides for any "grandfathering" of cities or fire districts in section .201. Section .201 does not grant exclusivity for ALS, LALS, or ambulance services. However, an eligible ".201" city may qualify for "grandfathering" under the provisions of 1797.224, if the criteria found there are fully met, subsequent to entering into a written agreement for integration and coordination into the local EMS system.

EMSA is concerned that the terminology, "grandfathering rights of a .201 city", used by LA County in the agreement with their provider agencies, is erroneous and potentially confusing. This is because .201 does not hold, by itself, any rights for "grandfathering."

Additionally, the terminology ".201 rights" has been used repeatedly in an apparent attempt to confer a greater role than what was originally intended. Consistent with the Apple Valley decision, EMSA believes that ".201 rights" should more properly be characterized as "rights and obligations" under section .201 that a city or fire district

must provide prehospital EMS, during the transitional period of time before an agreement to integrate into the local EMS system is reached.

The Significance of Agreements in 1797.204

It is important to note that in the arguments submitted to EMSA by the LAAFCA, H&S 1797.204 is not referenced. Health and Safety Code 1797.204 states, "The local EMS agency shall plan, implement, and evaluate an emergency medical services system, in accordance with the provisions of this part, consisting of an organized pattern of readiness and response services based on public and private agreements and operational procedures." H&S Section 1797.204 indicates the need for public and private agreements which is reflected in CCR Section 100167 (b) (4).

The importance of 1797.204 is made abundantly clear in the San Bernardino decision. The court articulated in multiple places that one of the key provisions of the entire EMS act is section 1797.204, which requires the local EMS agency to "plan, implement, and evaluate an emergency medical services system, in accordance with the provisions of this part, consisting of an organized pattern of readiness and response services based on public and private agreements and operational procedures".

It should be noted that the legislative intent of H&S Section 1797.204 is for both the LEMSA and cities to work cooperatively to provide quality care for patients, and typically agreements are the mechanism to ensure all parties are aware of, understand, and agree to comply with, local policies.

Definition of an "Eligible .201" city or fire district

When considering the applicability of H&S Section 1797.201 in relation to 1797.204, we must understand what constitutes an eligible ".201" city or fire district. Not all cities and fire districts may claim this provision.

The San Bernardino decision notes "As we have seen, the EMS Act aims to achieve integration and coordination among various government agencies and EMS providers, and the Legislature likely contemplated that section 1797.201 cities and fire districts would eventually be integrated into local EMS agencies." *County of San Bernardino* at 925.

There are several criteria that must be examined when applying this provision. The LAAFCA has requested that EMSA ensure eligible .201 agencies receive a determination within the EMS plan. Buried in this request is the imperative for EMSA to either determine directly, or set criteria for the evaluation of, whether or not a city or fire district claiming that they are a ".201" entity meets specific requirements for that eligibility.

The specific .201 eligibility criteria are identified in the San Bernardino and Apple Valley decisions. In order to be an eligible ".201" agency, the agency must meet all of the following:

- Be a City or Fire District that existed on June 1, 1980.
- Be the same entity that exists on the date of the ".201" eligibility evaluation.
- Provide service on June 1, 1980 at one of these types: ALS, LALS, or emergency ambulance services.
- Operate continuously in the same type of service.
- Have not yet entered into a written agreement that intended or contemplated "integration and coordination" into the local EMS system, including, but not be limited to, ALS, LALS, or emergency ambulance services.

An eligible .201 agency is entitled to retain, but not increase, their type of service. If they wish to increase the type of service provided, then an agreement must be made with the local EMS agency.

After an agreement is reached with the local EMS agency (post-agreement period), the agency is considered "integrated and coordinated" into the local EMS system. Authorization under 1797.178 is then derived from the local EMS agency. After an agreement is reached, an agency may not reclaim ".201" pre-agreement status. The provider agency may be "grandfathered" into an exclusive operating area if qualified in concordance with 1797.224 after a written agreement the local EMS agency is secured.

Medical Control

Medical control does not appear to be an issue posed to EMSA in these questions. Both letters agree that medical control is a function of the LEMSA medical director. It is clear that H&S Section 1797.220 specifically states that the local EMS agency, using state minimum standards, shall establish policies and procedures approved by the medical director of the local EMS agency to assure medical control of the EMS system.

The statute clearly intends that regardless whether or not a city meets the requirements of H&S Section 1797.201 for the provision of EMS, the city and the LEMSA must work together to formally coordinate the provision of medical control generally under Section 1798.

California Code of Regulations, Title 22, Division 9, Chapter 4, Article 7 further defines medical control responsibilities of the LEMSAs:

- Section 100167. Paramedic Service Provider: (b) an approved paramedic service provider shall: (4) Have a written agreement with the local EMS agency to participate in the EMS system and to comply with all applicable State regulations and local policies and procedures....
- Section 100169. Medical Control. The medical director of the local EMS agency shall establish and maintain control in the following manner:

> (a) Prospectively by assuring the development of written medical policies and procedures, to include at minimum:
> (1) Treatment protocols that encompass the paramedic scope of practice,
> (3) Criteria for initiating specified emergency medical treatments or standing orders for use in the event of communication failure...
> (4) Criteria for initiating specified emergency treatments prior to voice contact...

SFTPs are functionally a method to achieve "prospective" or "off-line" medical direction. Hence, provided an eligible ".201" agency complies with the medical control requirements, there is no reason that a formal written agreement be required in order to provide this patient-oriented care.

In the event there is no formal written agreement, in order to achieve the medical control requirement, mechanisms for accountability and quality must still be in place to ensure that EMS provider agencies adhere to all of the policies, procedures, medical control and protocols of the EMS system.

Types vs. Levels of Services

The LAAFCA analysis regarding the Types and Levels of services identified in the San Bernardino decision confuses the distinction between these two categories.

The LAAFCA position that types of prehospital emergency medical services include dispatching, non-transport, and emergency ambulance services is not supportable. The San Bernardino decision rejected dispatch as a type of service contemplated under 1797.201. The Court identified that the use of "dispatch" in section 1797.201 was referring to "internal" dispatch policies. Therefore, to describe dispatch as a "type" of service is not supported. The court noted that the EMS Act saw dispatch as consistent with the coordinating function for local EMS agencies that had medical control on the dispatch side "affecting the speed and effectiveness of the response to medical emergencies."

Reconciling this construct, it is most reasonable to define prehospital EMS types as "ALS, LALS, and emergency ambulance services" as consistent with 1797.85. In this example, ALS, LALS may be provided by non-transport services. This allows for consistency with the "grandfathering" provisions contemplated in 1797.224. As both 1797.85 and 1797.224 were chaptered after 1797.201, it provides a clear mechanism for integration of the system and receiving the benefits of that coordination and integration under a written agreement. The San Bernardino decision confirms this interpretation, "Thus, construing section 1797.201 in light of section 1797.224 and the system of EOA's that it envisions, we conclude section 1797.201 was designed to confine EMS operations by cities and fire districts to those types in which they were historically engaged as of June 1, 1980." *County of San Bernardino* at 932.

Additionally, the LAAFCA position that levels of prehospital emergency medical services include First Responder or Advanced First Aid, BLS, LALS, and ALS cannot be found or confirmed anywhere in statute or within the intent of the EMS Act. This position would allow an eligible .201 entity to freely move through these levels at its own discretion, and neither the San Bernardino nor Apple Valley decisions support this. Moreover, the "types" were first defined in the Petaluma decision as "BLS, LALS, ALS" rather than as levels. The use of First Responder or Advanced First Aid as either a level or a type of service is not found in the court's opinion. In the Schaefer decision, BLS was defined only as a level within the context of emergency ambulance services.

EMSA does not agree with the arguments presented by the LAAFCA regarding levels of service. The Petaluma decision, reinforced later by the Supreme Court in the San Bernardino decision, identifies that levels of services refer "to such matters as the quantity of available staff, vehicles, equipment, etc."

CONCLUSIONS:

28 years after the implementation of the statute, the issue of either the rights or obligations of cities or fire districts under .201 seems almost moot given the widespread integration of EMS services throughout California. Those services that had ALS, LALS, or Ambulance services in 1980, and wished to continue them, have generally retained that type of service. EMSA encourages all parties to move forward and work collaboratively for the development of an integrated and coordinated EMS system.

The following answers represent EMSA's opinion as to whether cities that meet the requirements of H&S Section 1797.201 are required to enter into written agreements with the LEMSA to participate in the Advanced Life Support (ALS) Standing Field Treatment Protocol (SFTP) Program and whether signing such agreements affect the "201 rights" of the cities. The LAAFCA asks in their first letter:

1. Are "written agreements" to effectuate "Standard Field Treatment Protocol (SFTP) required by statute for eligible ".201" agencies?

No. An eligible .201 agency is not required to sign an agreement in order to provide medical care under SFTPs.

2. Is the implementation of SFTPs an increase in the "Level" of prehospital EMS or an expansion into a new "Type" of prehospital EMS, as those terms have been interpreted by the San Bernardino and Apple Valley Cases?

No. SFTPs are not within the category of a "Type" or "Level" of prehospital EMS. As previously noted, SFTPs are considered "prospective" or "off-line" medical control.

The second letter from the LAAFCA asks whether or not state regulations, minimum standards, and recommended guidelines, are irreconcilably in conflict with H&S Section 1797.201. The three questions posed were:

1. Are written agreements required with eligible ".201" agencies for the purposes of establishing a local EMS agency's compliance with various state regulations found in "Chapter 4, 100167(b)(4)," "Chapter 3, 100105", "Chapter 3, 100107,", "Chapter 8, 100300(b)(4)," "Chapter 8. 100300(c)(1)?"

No. Provided these are eligible ".201" agencies, the derivation of their authorization is from statute. To remove this requirement from regulations would deviate from the legislative intent of 1797.204.

2. Are written agreements required with eligible ".201" agencies for the purposes of establishing a local EMS agency's compliance State "Minimum Standard 1.24?"

No. Provided these are eligible ".201" agencies, the derivation of their authorization is from statute. It is incumbent upon the LEMSA to determine the status of an agency claiming .201 eligibility based upon the criteria noted within this letter.

3. Would EMSA make a determination that Local EMS agencies who have eligible ".201" providers receive a "Meets minimum standard" assessment, where the "written agreement" evaluation criteria is applied to eligible ".201" agencies?

Yes. EMSA will recognize that a LEMSA has met the minimum standards as part of their EMS plan, without written agreements, based upon the statutory authorization of an eligible ".201" agency.

EMSA additionally received a letter from the Los Angeles County (LAC) EMS Agency requesting clarification about whether agreements required by EMSA to meet regulatory standards extinguish the rights and obligations of cities pursuant to H&S 1797.201.

1. Does signing any agreement with the EMS Agency extinguish the "grandfathering" rights of cities pursuant to?

Not necessarily. As noted earlier, an agreement between the LEMSA and a pre-agreement, eligible .201 agency should meet the general criteria of an intent to be integrated into and coordinated within an EMS system.

In this specific instance, the previous agreement for Los Angeles County's SFTP Program with the cities specifically stated that it would not affect the rights of a H&S Section 1797.201 city. The concern of the cities is that the renewal of the same agreement would jeopardize their ".201" eligibility. Whether or not signing such a narrow SFTP agreement actually affects H&S Section 1797.201 rights and

responsibilities is a legal question. There is a question as to whether a written agreement can specifically exempt the provisions of .201 while still receiving the same benefits or consideration afforded an agency that has formally integrated and coordinated its services within the EMS system. Additionally, a question exists if there is a threshold limit for "non-201" agreements, coupled with integrative behavior, before it appears manifest that an eligible ".201" agency has "integrated" into the system. These questions are legal questions that should be posed to the potential signatories own counsel for a specific opinion.

2. Can the local EMS agency design its system to include contracts with eligible ".201" agencies to implement new programs and services?

Yes. EMSA believes that a LEMSA may design its system to include contracts with eligible ".201" providers to implement new programs and services within the local EMS system. These would be primarily limited to issues of medical control and would not include the addition of a new type of service.

If there is need to provide further clarification on this issue, it can be accomplished through modification of the EMS Systems Standards and Guidelines which are currently under revision.

If you have any questions, please contact either myself or Tom McGinnis at (916) 322-4336.

Sincerely,

R. Steven Tharratt, MD, MPVM
Director

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